

BEFORE THE WEST VIRGINIA
SUPREME COURT OF APPEALS

CHARLESTON, WEST VIRGINIA

In the matter of:

ROY JUSTICE,

Appellant/Petitioner,

v.

LOWE'S HOME CENTER INC.,

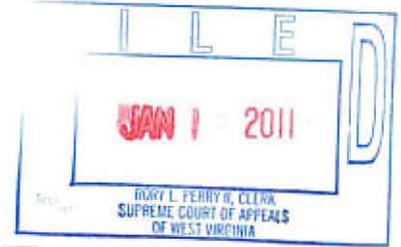
Appellees/Respondents.

Appeal No: 2044528

JCN No: 900042126

OOJ CASE ID: OOJ-A190-042126

OOJ ORDER DATE: 4/30/2010



PETITION ON BEHALF OF THE PETITIONER
ROY JUSTICE

OTIS R. MANN, JR.
215 Hale Street
Charleston, West Virginia 25301
(304) 344-0708
State Bar # 2311

STATEMENT OF THE CASE

This is a petition by the claimant to the Order of the Workers' Compensation Board of Review dated December 22, 2010, which affirmed the Order of the Administrative Law Judge dated April 30, 2010, affirming the Claims Administrator's Ruling dated December 16, 2007, which suspended and vacated his permanent total disability awards of December 7, 1994.

STATEMENT OF FACTS

The claimant sustained an injury on February 20, 1990, while loading a riding lawnmower with three or four other co-workers at Lowe's, where he was employed. The claimant was granted a permanent total disability award by Order dated December 7, 1994.

In February of 2006, the claim was reopened by the employer for consideration of setting aside the claimant's permanent total disability award. On August 16, 2007, the Self-Insured employer notified the claimant that the permanent total disability award of December 7, 1994, may be suspended. By Order dated December 16, 2007, his permanent total disability award was vacated. A timely protest was filed.

Evidence submitted on behalf of the claimant consisted of two vocational rehabilitation reports. The first was authored by Gloria Alderson, CDMS, ABDA, a rehabilitation specialist, dated November 20, 2007. The other was authored by Elizabeth Davis, RN, MS, CRRN, a rehabilitation specialist, and dated August 21, 2009.

The employer had the claimant evaluated by a number of physicians. The

medical reports introduced by the employer are of little benefit in this case, inasmuch as none of the reports indicated that he could return to his prior employment, which was heavy to very heavy work. The question in this case is whether or not the claimant could be rehabilitated to perform other work.

With regard to that issue, the employer introduced a report dated March 2, 2006, by Shawn Snyder, a rehabilitation specialist/vocational evaluator; a functional capacity evaluation dated November 14, 2006; and a report dated May 1, 2007, from Lori Hudak, a rehabilitation counselor.

In addition to the vocational reports, a functional capacity evaluation was performed on November 14, 2006, by Brenda Marcum, PT, of Huntington Physical Therapy.

Unfortunately, because of the claimant's physical condition, he was unable to complete the functional capacity evaluation. Mr. Justice was referred for the evaluation to determine his upper extremity strength and dexterity, his current tolerance for lifting, his level of strength demand, and his endurance for specific work tolerances.

Unfortunately, Mr. Justice was unable to complete the most important portion of the test, which was the endurance for specific work tolerances. Ms. Marcum went on to note that the reliability/accuracy of the pain/limitation, disability findings were reliable with his subjective reports of pain generally matching well with distraction-based clinical observations. It was noted that the claimant required frequent change of position after fifteen (15) minutes in any position. He demonstrated poor psychodynamics; trouble stooping and bending; slow performance times; and this was all felt to be related primarily to poor tolerance to work and sustained stooping and poor tolerance to prolonged standing. The claimant could not carry a box with two hands, declining,

stating that it caused more strain on his back and more pain. He declined to lift from the floor to knuckle position, stating that he could not get in that position. His endurance for specific work simulation could not be determined because he reported his pain level to be 9/10.

Even though this functional capacity evaluation talks in terms of doing sedentary work to light work, there is nothing in this report that indicates this man could do this for an eight (8) hour day, five (5) days a week, fifty-two (52) weeks a year.

It is submitted that the vocational evaluations performed by, and on behalf of the employer are not reliable inasmuch as they did not take the information into consideration that was found on behalf of Ms. Marcum, the evaluator of the functional capacity evaluation.

It is to be noted that Ms. Hudak, who was one of the vocational evaluators for the employer, noted that, although she felt the claimant was an appropriate candidate for rehabilitation, his long absence from competitive employment and his disabled lifestyle presented a significant barrier to employment and that rehabilitation efforts might be ineffectual.

Elizabeth Davis performed an evaluation on behalf of the claimant. She noted that "echoing" the words of Ms. Hudak, ".....these barriers are significant and.." in her opinion, " that rehabilitation efforts might be ineffectual", she would agree with these statements and further stated that, unfortunately for the claimant, the time frame in which the rehabilitation would have been successful has long passed. She further noted she would not anticipate his view or functioning level to significantly increase for a favorable return to work.

The Order in question was entered by Specialty Risk Services. After reviewing Medical and vocational rehabilitation evidence in the record, Maria Formosa, account consultant, noted on the last page of the Order, "Lowe's has followed all necessary procedural requirements to vacate your permanent total disability benefits as provided in § 85-5-5 (5.2). In February of 2006, you were given notice of the employer's intent to reopen your claim. Upon reopening, the employer ascertained your current physical, psychological and vocational statuses through multiple evaluations." Ms. Formosa went on to note that the Order was vacated.

Chapter 23, Article 4, Section 16(d), gives the continuing power and jurisdiction over claims in which permanent total disability awards have been awarded after the 8th day of April, 1993. § 23-4-16(d)(2), states in part....."The claimant's former employer shall not be a party to the re-evaluation, but shall be notified of the re-evaluation and may submit any information as the employer may elect....."

In reviewing this matter, I could not find any motion on behalf of the former employer to reopen this claim under this Section. It is submitted that Specialty Risk Services reopened this matter, had the examinations performed, and made the final decision. I further submit that based upon the language in their Order, Specialty Risk Services is Lowe's and therefore, is in violation of the statute. Please note the Order, "The employer ascertained your current physical, psychological, and vocational status through multiple evaluations."

The claim was submitted for decision and by Order dated April 30, 2010, the Administrative Law Judge Affirmed the Order dated December 16, 2007, which suspended and vacated the claimant's permanent total disability award.

A timely appeal was filed. By Order dated December 22, 2010, the Board of Review Affirmed the April 30, 2010, Order.

III

STANDARD OF REVIEW

Where the Commission asserts an error of law, the Board's standard of review is *de novo*.

The [Board] shall reverse, vacate or modify the order or decision of the Administrative Law Judge if the substantial rights of the petitioner or petitioners have been prejudiced because the Administrative Law Judge's findings are:

- 1) In violation of statutory provisions; or
- 2) In excess of the statutory authority or jurisdiction of the [ALJ];
or
- 3) Made upon unlawful procedures; or
- 4) Affected by other error of law; or
- 5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or
- 6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

W.Va. Code §23-5-12(b).

(a) For all awards made on or after the effective date of the amendment and reenactment of this section. . . resolution of any issue raised in administering this chapter shall be based on a weighing of all evidence pertaining to the issue and a finding that a preponderance of the evidence supports the chosen manner of resolution. The process of weighing evidence shall include, but not be limited to, an assessment of the relevance, credibility, materiality and reliability that the evidence possesses in the context of the issue presented. *Under no circumstances will an issue be resolved by allowing certain evidence to be dispositive simply because it is reliable and is most favorable to a party's interests or position.* If, after weighing all of the evidence regarding an issue in which a claimant has an interest, there is a finding that an equal amount of evidentiary weight exists favoring conflicting matters for resolution, the resolution that is most consistent with the claimant's position will be adopted.

(b) Except as provided in subsection (a) of this section, *a claim for compensation filed pursuant to this chapter must be decided on its merit and not according to any principle that requires statutes governing workers' compensation to be liberally construed because they are remedial in nature.* No such principle may be used in the application of law to the facts of a case arising out of this chapter or in determining the constitutionality of this chapter. [Emphasis added].

W.Va. Code §23-4-1g(2003)

IV

ISSUE

**WHETHER OR NOT THE CLAIMANT IS PERMANENTLY AND TOTALLY
DISABLED.**

V

ARGUMENT

W.Va. Code § 23-4-1g provides that the resolution of any issue shall be based on a weighing of all evidence pertaining to the issue and a finding that a preponderance of the evidence supports the chosen manner of resolution. The process of weighing evidence shall include, but not limited to, an assessment of the relevance, credibility, materiality and reliability that the evidence possesses in the context of the issue presented. No issue may be resolved by allowing certain evidence to be dispositive simply because it is reliable and is most favorable to a party's interests or position. The resolution of issues in claims for compensation must be decided on the merits and not according to any principle that require statutes governing workers' compensation to be liberally construed because they are remedial in nature. If, after weighing all of the evidence regarding an issue, there is a finding that an equal amount of evidentiary weight exists for each side, the resolution that is most consistent with the claimant's position will be adopted.

Preponderance of the evidence means proof that something is more likely so than not so. In other words, a preponderance of the evidence means such evidence, when considered and compared with opposing evidence, is more persuasive or convincing. Preponderance of the evidence may not be determined by merely counting

the number of witnesses, reports, evaluations, or other items of evidence. Rather, it is determined by assessing the persuasiveness of the evidence including the opportunity for knowledge, information possessed, and manner of testifying or reporting.

With regard to the construction of the statutory language, it is submitted that the West Virginia Supreme Court of Appeals has Affirmed the right of the Legislature of the State of West Virginia to change the law regarding Workers' Compensation in the State of West Virginia, and to make it retroactive. With regard to the changes made by the Legislature, they specifically forbid the employers from being active of the re-evaluations of individuals who were drawing permanent total disabilities under the old law. This law applies, not only to the subscribers of the Fund, but to the Self-Insured employers that elected to cover their own claims.

The Order entered by the Self-Insured employer specifically noted "the employer ascertained your current physical, psychological and vocational status through multiple evaluations." This cannot be any more clear that the employer violated the statute and therefore, the Orders entered are invalid and should be set aside based upon this violation.

If the Self-Insured employer did not agree with this statutory change, they should have gone back to the Legislature to change it, rather than, taking it upon themselves to make the decision to violate the statute.

Based upon the violation, this matter should be sent back, reversed, and the permanent total disability should be reinstated.

In addition to the foregoing, there is no question that the preponderance of the evidence indicates that the claimant is not employable in the National Economy. There is no question that the Functional Capacity Evaluation performed on November 14,

2006, cannot show by a preponderance of the evidence that the claimant is able to perform work on any basis.. The individual conducting the test noted that the reliability of the pain limitations and the disability findings were reliable with his subjective report of pain generally matching well with distraction based clinical observations. In other words, he was not faking the pain issue. He needed frequent change of positions after 15 minutes in any position and demonstrated poor psychodynamics, trouble stooping and bending, slow performance times, and this was all felt to be related to primarily to poor tolerance to work and poor tolerance to prolonged standing. All of these conditions would prevent an individual from performing work on a sustained basis (5 days a week, 8 hours a day, 52 weeks a year). Three, out of the four vocational experts noted that the claimant's absence from competitive employment presented a significant barrier to employment. Lori Hudak noted that the claimant had not worked for 20 years, and that vocational efforts would be difficult under any circumstances. Generally, rehabilitation specialists who didn't mention the claimant being out of work for 20 years, was Mr. Snyder, who basically found jobs that Mr. Justice could do based upon the Functional Capacity Evaluation of sedentary to light, not taking into consideration the problems noted in the Functional Capacity Evaluation by Ms. Marcum.

Over the past 20 years, the labor market has become more computerized and is obviously a great deal different than when Mr. Justice last worked. It is submitted that before Mr. Justice could be placed in any type of employment, he would need vocational rehabilitation. None of the individuals who evaluated him felt that vocational rehabilitation was feasible. Therefore, it is submitted that Mr. Justice has shown by a preponderance of the evidence that he continues to be disabled, and is entitled to have

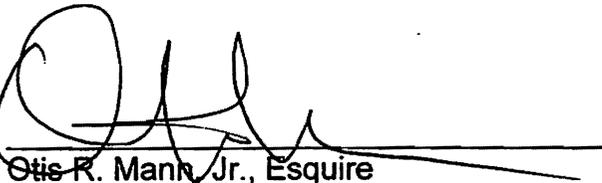
his benefits reinstated.

VI

CONCLUSION

For all the above-mentioned reasons, we would request that this Honorable Court enter an Order vacating the Order of the Administrative Law Judge, dated April 30, 2010, and direct that the matter be remanded to the claims administrator, with directions to re-enter and affirm the claimant's permanent total disability award of December 7, 1994.

ROY JUSTICE
By counsel



Otis R. Mann, Jr., Esquire
Attorney at Law
215 Hale Street
Charleston, WV 25301
(304) 344-0708

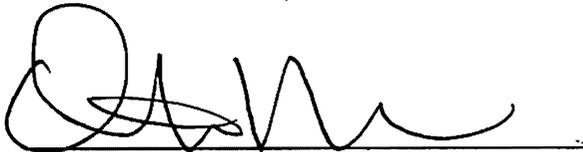
CERTIFICATE OF SERVICE

I, Otis R. Mann, Jr., counsel for the petitioner, do hereby that a true and exact copy of the foregoing Petition on Behalf of the Petitioner, was mailed on this 13th day of January, 2011, via the U.S. mail, postage prepaid, to the following addresses listed below.

Specialty Risk Services
P.O. Box 31180
Independence, OH 44131

H. Toney Stroud, Esquire
P.O. Box 1588
Charleston, WV 25326-1588

Lowe's Homes Centers, Inc.
c/o H. Toney Stroud, Esquire
P.O. Box 1588
Charleston, WV 25326-1588



Otis R. Mann, Jr.

APPENDIX

1. **Order of the Workers' Compensation Board of Review dated December 22, 2010;**
2. **Order of the Administrative Law Judge dated April 30, 2010;**
3. **Claims Administrator's Order dated December 16, 2007;**
4. **Report of Gloria Alderson, CDMS, ABDA, dated November 20, 2007;**
5. **Report of Elizabeth Davis, RN, MS, CRRN, dated August 21, 2009;**
6. **A Functional Capacity Evaluation dated November 14, 2006;**
7. **Report of Shawn Snyder, dated March 2, 2006;**
8. **Report of Lori Hudak, dated May 1, 2007.**